No. 75-8231

IN THE

Supreme Court of the United States

October Term, 1975

RAYMOND BELCHER,

Petitioner,

v.

CASEY D. STENGEL, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on September 16, 1975.

OPINION BELOW

The written opinion of the United States Court of Appeals for the Sixth Circuit, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Sixth Circuit was entered on September 16, 1975, and this petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1) and Rule 19 (1) (b)

of the SUPREME COURT OF THE UNITED STATES REVISED RULES.

QUESTION PRESENTED

Does the fact that an off-duty police officer, out of uniform, is required by police department regulation to carry a weapon at all times, establish that any use of that weapon against the person of another, even though the officer is engaged in private conduct at the time, to be an act "under color of law" within the meaning of 42 U.S.C. §1983?

STATUTORY PROVISION INVOLVED

The applicable statutory provision involved is 42 U.S.C. §1983:

> §1983 Civil action for deprivation of rights.
>
> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF CASE

This case arose from an incident in a public bar in Columbus, Ohio, known as Jimmie's Cafe at approximately 1:30 a.m. on March 1, 1973. Respondents' decedents Michael Noe and Robert Ruff and Respondent Casey D. Stengel,[1] three men in their early twenties, be-

[1] The following are listed as plaintiffs in the complaint: Casey D. Stengel, individually and on behalf of all persons similarly situated; Charles Ruff, Adminstrator of the Estate of Robert D. Ruff, deceased; and Timothy Noe, Adminstrator of the Estate of Michael J. D. Noe, deceased.

came involved in an altercation with other patrons of the bar including the Petitioner, Raymond Belcher. At that time Raymond Belcher was an off-duty police officer out of uniform and engaged in private social activity. During the affray Raymond Belcher discharged a firearm, striking his assailants and resulting in the deaths of Noe and Ruff and seriously injuring Stengel.

Thereafter Respondents brought this action in the United States District Court for the Southern District of Ohio, Eastern Division, under authority of 42 U.S.C. §1983 and §1985 alleging categorically that Raymond Belcher had acted in the performance of his duties and had violated their civil rights to due process and equal protection of the laws as provided in the Fourteenth Amendment of the Constitution of the United States. Jurisdiction was invoked under 28 U.S.C. §1331 and §1343. Also named as defendants were the City of Columbus, Ohio, and various police officers and supervisors who were alleged to have conspired to cover up facts of the incident.[2] The case was docketed as District Court case number 72-67.

Aside from a mere conclusory allegation that the petitioner had acted in the line of duty and the assertion that he had used a weapon which he carried while off-duty pursuant to a police department regulation, the only pertinent description of petitioner's conduct set forth in the Complaint is stated in paragraph 8 thereof as follows:

[2] The following persons were listed as defendants in their capacity as Columbus police officers and individually: Chief Dwight Joseph; Captains Francis B. Smith, Robert Taylor, and Richard O. Born; Lieut. Earl Belcher; Sgt. P. Hopkins; Officers James Newell, E. R. Woods, E. Young and John Hawk; and various John Doe officers and administrative officials of the City of Columbus. James J. Hughes, Jr. was substituted as a John Doe Defendant prior to trial and was dismissed pursuant to motion at the close of the plaintiff's case in chief.

> " * * * Defendant Raymond L. Belcher, who was out of uniform and in no way identified as a Columbus policeman, and in no way involved in the minor dispute heretofore described, intervened by attacking one of plaintiff's decedent from the rear by grabbing him around the neck from the rear; said intervention by said Raymond L. Belcher being without any notification or attempt to notify anybody in the Cafe that he was an off-duty Columbus policeman and without any attempt by said Raymond L. Belcher to make a police arrest or a citizen's arrest of any kind * * *."
>
> [Complaint, ¶8, annexed hereto; App., p. 47.]

The District Court granted a Motion to Dismiss the City of Columbus. Motions to Dismiss, as well as a Motion for Summary Judgment, were filed on behalf of all other defendants, including the petitioner, all raising the jurisdictional defense that the respondents herein had failed to properly allege that petitioner had acted under color of law and, in fact, had alleged facts which affirmatively stated that petitioner had not acted under color of law. The District Court denied these Motions. [App., pp. 36 and 41 respectively.] An Answer was filed on behalf of all defendants asserting, among other defenses, that Raymond Belcher was justified in using his weapon as a matter of self-defense and, again, asserting that the District Court lacked jurisdiction as the petitioner had not acted "under color of law" during the incident.

The case was tried to a jury with the trial commencing on June 10, 1974. At the close of the plaintiffs' case in chief, the District Court granted a Motion for a Directed Verdict on behalf of all defendants with the exception of Raymond Belcher. All defendants except Belcher were dismissed at that point and, consequently, any claims with respect to 42 U.S.C. §1985. The trial then proceeded

against Belcher alone for a jury determination of the issues under 42 U.S.C. §1983.

The evidence was uncontradicted that on the morning in question Noe, Ruff and Stengel entered Jimmie's Cafe at approximately 1:00 a.m.; ordered drinks; and that Noe and Stengel engaged in playing a "bowling" game. Shortly thereafter the Petitioner, Raymond Belcher, entered the bar in the company of a Miss Bonnie Lohman and took a seat at a booth near the door. Raymond Belcher was an off-duty Columbus police officer; he was not in uniform and was engaged in private social activity. He had in his possession a can of chemical mace and a pistol which he carried pursuant to a regulation of the Columbus police department which required off-duty officers to carry a weapon. [Joint Ex. 44(b) atached hereto, App., p. 60.]

It was further undisputed that while Raymond Belcher was seated in the booth with Bonnie Lohman and two other acquaintances, an altercation erupted between Noe and another patron, Mrs. Agnes Morgan. Blows were struck between Noe and Mrs. Morgan resulting in Mrs. Morgan's being knocked either to the floor or against a piano. Mrs. Morgan's husband, Kyle Morgan, then arose and an altercation developed between Noe and Kyle Morgan; Noe being joined by Ruff. The fight escalated and Kyle Morgan ended up on the floor with Noe standing over him.

Although the evidence was in dispute as to whether Raymond Belcher became involved in the altercation as an aggressor or as a matter of self-defense, there was absolutely no dispute, and it was set forth in the Complaint, *infra*, that at no time did he identify himself as a police officer or make any attempt to effect an arrest, either as a police officer or as a private citizen.

Belcher testified that he had observed the fight and knew it should be stopped but realized that, acting alone, he would be unable to do so. He decided to call the police which necessitated leaving the bar and proceeding to a telephone booth on the sidewalk, just outside. As he arose from his seat, he was immediately attacked by the respondent, Stengel, who had positioned himself near the door. Belcher then described the ensuing struggle through to the point where he was compelled to use his weapon as a matter of self-defense:

> "Mr. Stengel began throwing punches, attempting to strike me with his fist and attempted to throw me to the floor. I grabbed ahold of the booth and again told him to let go of me.
> "Mr. Ruff ran across the floor at that point and I was fighting both men. I was tripped or thrown on top of a small table there by the front of the bar itself, I think they are known as cabaret or cafe tables, they are very small tables, maybe two feet square.
> "My back went over this table. My head struck the juke box, and I recall being kicked for a moment after that. I was kicked several times and then there was a moment of darkness where I could neither feel nor hear anything. I don't know whether I was unconscious or apparently I was, but how long I was unconscious I have no idea. It could have been ten minutes.
> "As I looked up from the floor with my legs up over a table, I could see nothing but feet and fists. I was being kicked in the face and the head by at least two men.
> "At that time I tried to get up off the floor. I literally tried to pull myself up off the floor by using the men's clothing that were on top of me. I at one point had a man's belt in my hand and tried to drag myself up off the floor by his belt buckle, so I could get up off the floor and defend myself.

> "I was kicked first one direction, then the other direction. I continued to try to get up off the floor. I was getting tired. I was beginning to lose.
> "At that time somewhere in this struggle my teargas was kicked out of my hand. I had been spraying it, trying to spray directly into these men's faces from the floor but somewhere during the fight the tear gas was stomped from my hand.
> "As I began to realize that I wasn't gonna be able to get myself off the floor, I reached for the pistol that I carried in my waistband in my pants. At that time I was carrying a .32 Browning automatic, and the gun was not there.
> "I was still being kicked and stomped. I put my arms, my left arm over my face to shield my face from these kicks, and looked across the shiny barroom floor to see if the pistol was lying there some place.
> "The gun was not there. The thought went through my mind, oh, God, if these men, whoever they are, find that gun on the floor, they will kill me with my own weapon.
> "I felt the pistol underneath my back, still being kicked and stomped. I brought the weapon around in my right hand and shoved backwards to get these men off of me and I fired three shots straight into the ceiling, or straight into the mass of bodies that were on top of me.
> " * * * .
> Question: "Officer Belcher, as you were laying on the floor after you had come up to after you had recovered your weapon, as you removed the weapon from behind your back and pointed it upward . . . what thought was in your mind?"
> " * * * . "
> Answer: "The thought in my mind at that point was that I was going to be killed on that barroom floor if I did not use the weapon I had, I would be killed."

[T., pp. 650-652 and 661; annexed hereto as App., pp. 66 and 69.]

Belcher's testimony was corroborated by all other eye witnesses with the exception of Stengel. Although Belcher testified to firing three shots inside the bar, there is some dispute as to whether Noe was shot inside or outside. Belcher stated that he had struggled with Noe outside and struck him in the face with the gun and it went off. Noe was found outside the bar.

Stengel's testimony in regard to Raymond Belcher's involvement did not include evidence bearing on the question of whether or not Belcher acted as a private citizen or pursuant to a police duty except to say that at no time did Belcher identify himself as a police officer; nor did Stengel, Noe or Ruff understand him to be a police officer. Stengel merely portrayed Belcher as an aggressor.

Stengel testified that Belcher grabbed Robert Ruff from behind and that he (Stengel) in turn grabbed Belcher and threw him to the floor. He also stated that he did not kick Belcher but only kicked at Belcher's hand which grasped the chemical mace. Stengel stated he did not see Noe or Ruff strike Belcher; however, Stengel did state that his head was turned and he could not see Ruff or Belcher immediately prior to the shots' being fired. Stengel's description of events was in direct conflict with all other witnesses.

The only other evidence in regard to Belcher's action came in the form of later developed opinions by certain City officials and police supervisors who were not eyewitnesses to the incident, but formed the view that Belcher had acted in the line of duty. These opinions were admitted into evidence in order to support respondents' conspiracy allegations against the defendant

supervisors and officials, all of whom were dismissed at the close of respondents' case in chief. Their testimony established that Raymond Belcher had received workmen's compensation benefits for the injuries he had incurred that evening. The Chief of Police of the Columbus Police Department testified that a police officer was required to take action in any type of police or criminal activity twenty-four hours a day and would be disciplined if he did not do so. He was of the opinion that Belcher had acted under the authority of that requirement. Also, a letter to Belcher from the then Safety Director of the City of Columbus, James J. Hughes, Jr., a defendant in the case, was admitted into evidence and stated that it was the opinion of those police supervisors who comprised the Firearms Board of Inquiry that Belcher was justified in using the firearm and that his actions were in the line of duty.

At the close of all evidence the issues were submitted to the jury including the question of whether or not Belcher had acted under color of law in the incident. The jury found that Belcher had acted under color of law as implied in its verdict which awarded Stengel $800,000 in compensatory and $1,000 in punitive damages; Noe's estate $9,000 compensatory and $1,000 punitive damages; and Ruff's estate $19,000 compensatory and $1,000 punitive damages.

Belcher filed a Motion for a Judgment Notwithstanding the Verdict and/or for a New Trial again asserting that the evidence did not support the finding that he had acted under color of law. The Motion was overruled by the District Court. [Order of the District Court, annexed hereto, App., p. 43.] An appeal was taken to the Sixth Circuit specifically raising the issue as to whether the District Court erred in refusing to direct that petitioner

had not acted under color of law. The case was docketed in the Sixth Circuit as case number 75-1075. On September 16, 1975, the Sixth Circuit rendered its judgment and issued a written opinion affirming the District Court. [Judgment and Opinion of the Sixth Circuit, annexed hereto, App., pp. 21 and 22, respectively.]

The question posed herein was consistently raised by pleading and motions of the petitioner in the District Court and on appeal. The question was specifically considered and decided by the United States Court of Appeals for the Sixth Circuit.

REASONS FOR GRANTING WRIT

I. The Finding By The Sixth Circuit Court Of Appeals And The District Court That The Petitioner Had Acted Under Color Of Law, Decided An Important Federal Question In A Way So As To Conflict In Principle With The Applicable Decisions Of This Court And Lower Federal Courts.

It is petitioner's contention that the District Court lacked jurisdiction under 42 U.S.C. §1983 in that the Complaint did not properly allege, nor was the evidence sufficient to support a conclusion, that the petitioner had acted under color of law. By overruling petitioner's Motions to Dismiss and for Summary Judgment, submitting the issue to the jury, and failing to grant petitioner's Motion for a Judgment Notwithstanding the Verdict and/or a New Trial, the District Court, as affirmed by the Sixth Circuit, has decided that issue against the existing principles set forth by applicable decisions of this Court and other lower Federal Courts. The evidence did not support the jury's determination, implicit in their verdict, that the petitioner had acted under color of law.

42 U.S.C. §1983, originally known as the Ku Klux Act of April 20, 1871, was enacted after the Civil War to establish a federal cause of action to redress deprivations of federal constitutional rights which occurred as a result of state action. From the Act's inception the Supreme Court of the United States had recognized its application provides redress only for actions involving state authority and does not erect a shield against private conduct between individuals, no matter how serious or wrongful such conduct may be. This Court stated in the *Civil Rights Cases*, 109 U.S. 3, 9-12 (1883):

> "In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against state aggression, cannot be impaired by the wrongful acts of individuals, unsupported by state authority in the shape of laws, customs or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party it is true, whether they affect his person, his property or his reputation; but if not sanctioned in some way by the State, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress."

Although this Court has applied the concept of "under color of law" to official actions which constituted a "misuse of authority," *United States v. Classic*, 313 U.S. 299, 326 (1941) and also to officials who engaged in violence under a "pretense" of law, *Screws v. United States*, 325 U.S. 91, 111 (1945) the Court has never abandoned and has continually emphasized the essential dichotomy between conduct which is wholly private and not within the scope of 42 U.S.C. §1983, and that which is done in pursuit of one's official duties. Justice Douglas pointed

out the distinction in *Screws, supra,* at 325 U.S., pp. 108 and 111:

> "We agree that when this statute is applied to the action of state officials, it should be construed so as to respect the proper balance between the States and the federal government in law enforcement. Violation of local law does not necessarily mean that federal rights have been invaded. The fact that a prisoner is assaulted, injured, or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States.
>
> " * * *.
>
> " * * *.
>
> " * * *. Here the state officers were authorized to make an arrest and to take such steps as were necessary to make the arrest effective. They acted without authority only in the sense that they used excessive force in making the arrest effective. It is clear that under 'color' of law means under 'pretense' of law. Thus acts of officers in the ambit of their personal pursuits are plainly excluded. * * *."

The principles applied in determining the question of whether "state action" is present in terms of the Fourteenth Amendment to the Constitution of the United States are easily analagous to those involved in reviewing whether action "under color of" state law exists. The terms "state action" and "under color of" state law are usually treated as one and the same although it has been recognized that when a private party acts alone, more must be shown to establish that he acts "under color of" a state statute or other authority than is needed to show his actions constitute "state action." *Adickes v. Kress & Co.*, 398 U.S. 144, 210 (1970) [Brennan, J., concurring in part]. Although this Court has not established a clear definition of what is and what is not action under

color of law, it has clearly provided that more than a trivial nexus between the entity or person on the one hand, and the state on the other, is necessary. In *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 173 (1972) this Court stated:

> "The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services include such necessities of life as electricity, water, and police and fire protection, such a holding would utterly emasculate the distinction between private as distinguished from state conduct set forth in The Civil Rights Cases, supra, and adhered to in subsequent decisions. Our holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations,' Reitman v Mulkey, 387 US 369, 380, 18 L Ed 2d 830, 838, 87 S Ct 1627 (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition."

Moreover, where the allegation of state action or involvement is not obvious, the question as to its existence emits no easy answer and requires a careful sifting of the facts and circumstances of each particular case. *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 722 (1961).

In major cases involving the construction to be given the term "under color of" law or state authority, this Court has made its determinations by focusing not upon whether the defendant possessed or used a physical instrument peculiar to his office, but on whether or not he was engaged in, or under the pretense of engaging

in, his official duties. *United States v. Classic, supra* [state election officials engaged in election fraud]; *Screws v. United States, supra* [state police officials using unlawful force during an arrest]; *Williams v. United States,* 341 U.S. 97 (1951) [police special deputy coercing confessions during a criminal investigation]; *Griffin v. Maryland,* 378 U.S. 130 (1964) [special deputy sheriff wrongfully arresting and instituting criminal proceedings]. In *Griffin, supra,* this Court stated the basis for its determination that the actor had committed violations of constitutional significance was that he had purported to exercise his authority as deputy sheriff, notwithstanding his combined status as an employee of a private corporation. In 378 U.S., at page 135, the Court pointed out:

> "* * *. If an individual is possessed of state authority and purports to act under that authority his action is state action. * * *."

In applying these principles, lower Federal Courts have recognized that a person does not act "under color of law" simply because he is employed by the state. *Cole v. Smith,* 344 F.2d 721 (8th Cir. 1965); *Byrne v. Kysar,* 347 F.2d 734 (7th Cir. 1965); *Duzymski v. Nosal,* 324 F.2d 924 (7th Cir. 1963). Nor does he so act purely by reason of his status as a police officer engaged in an assault as a matter of private conduct. *Nugent v. Sheppard,* 318 F. Supp. 314 (N.D., Ind., 1970); *Johnson v. Hackett,* 284 F. Supp. 933 (E.D., Penn., 1968); *Watkins v. Oakland Jockey Club,* 183 F.2d 440 (8th Cir. 1950). Rather, the proper focus must be upon the nature of the act performed and whether the officer had actually embarked upon the performance of his official duties. *Robinson v. Davis,* 447 F.2d 753 (4th Cir. 1971), *cert. denied,* 405 U.S. 979 (1972); *United States, ex rel., Smith v. Heil,* 308 F. Supp. 1063 (E.D., Penn., 1970); *Johnson v. Hackett, supra.*

Contrary to the principles set forth above, the Sixth Circuit and the District Court below, wrongfully relied

upon the fact that the petitioner resorted to the use of a weapon which he carried pursuant to police regulations, to raise the inference that the weapon was used under color of law. [Opinion of the United States Court of Appeals for the Sixth Circuit, annexed hereto, App., p. 25.] To permit the use of such a weapon alone to raise the inference of official action would truly emasculate any possibility of its use in private conduct and would irretrievably extend the scope of 42 U.S.C. §1983 beyond its intended application. In *Screws v. United States, supra,* this Court did not infer the defendants' conduct to be under color of law because they were police officers who used a blackjack, but rather because they used the blackjack in the performance of their official duties. In its opinion this Court stated in 325 U.S., at pages 108 and 109:

> "* * *. We are of the view that petitioners acted under 'color' of law in making the arrest of Robert Hall and in assaulting him. They were officers of the law who made the arrest. By their own admissions they assaulted Hall in order to protect themselves and to keep their prisoner from escaping. It was their duty under Georgia law to make the arrest effective. Hence, their conduct comes within the statute. * * *."

Contrary to the situation in *Screws, supra,* the Complaint in the instant case specifically alleges that the petitioner was off duty, out of uniform, did not attempt to arrest anyone, and did not identify himself to be a police officer. He merely became involved in an altercation.

The petitioner did not contend in his Motion to Dismiss that he was not under color of law solely because of his off-duty status, as suggested by the District Court in its order overruling the motion [App., p. 38], but petitioner contended that the proper inference to be derived from the facts pleaded was that the petitioner did not act as a police officer.

The evidence at trial from those who witnessed the incident produced nothing that would indicate that the petitioner had, at any time, embarked upon the exercise of his official duties. As was alleged in the Complaint, the witnesses did not dispute that the petitioner was off-duty and engaged in private social activity. It was further uncontradicted that he did not attempt to make an arrest or identify himself as a police officer; nor did the respondents' decendents or the respondent understand him to be a police officer.

Involvement in an altercation in and of itself, even where the person is a police officer, does not raise the inference that his action is under color or "pretense" of law. *Johnson v. Hackett, supra; Smith v. Heil, supra.* Moreover, the petitioner's stated intention was to proceed to a telephone in order to call the police which is no more than the expected act of any private citizen under the circumstances.

In its opinion, *infra* [annexed hereto, App., p. 26], the Sixth Circuit commented that the petitioner used poor judgment in failing to identify himself as a police officer which that Court believed would have easily solved matters. The petitioner suggests that the more logical inference to be drawn from such a failure is the fact the petitioner did indeed not intend to act as a police officer, but rather as a private citizen. In any event, where there is an absence of any evidence to indicate that the petitioner had engaged in, or attempted to engage in, the performance of his official duties, to find his involvement in an altercation to be activity under color of law is contrary to the stated principles governing 42 U.S.C. §1983.

In addition to its focus upon the weapon used, it is clear from the opinion of the Sixth Circuit that it placed

considerable reliance upon the opinions of certain city officials who had not witnessed the event but offered testimony as to their later developed beliefs that the petitioner had acted in the line of duty and was covered by the Workmen's Compensation Law of the State of Ohio. [Opinion of the United States Court of Appeals for the Sixth Circuit, annexed hereto, App., pp. 25.] It is petitioner's contention that the lower Courts wrongly relied upon such evidence which was offered during the conspiracy portion of the trial and prior to the dismissal of all other defendants. The question of whether the petitioner acted under color of law is a question of law for the determination of the Federal Court based upon a careful examination of the manner and character of his actions at the time and place of the event. *Robinson v. Davis, supra.* Opinions offered by persons who did not witness petitioner's actions are not relevant to the determination of the federal issue in question and should not be permitted to influence or displace a Federal Court's judgment as to that jurisdictional issue.

Had the United States Court of Appeals for the Sixth Circuit and the District Court below reviewed the properly relevant evidence and allegations pertaining to the federal question presented under 42 U.S.C. §1983, using the stated principles set forth by this Court and other lower Federal Courts, they would have been compelled to determine that the petitioner had not acted under color of law.

II. The Decisions Below Raise A Question Of Federal Statutory Interpretation Of Great Importance And Should Be Decided By This Court.

Aside from the obvious importance which the instant case reflects for the individual litigants herein by the fact that a single police officer has incurred a federal

damage judgment in excess of $830,000 for conduct engaged in while off-duty, the case presents important statutory considerations in a swiftly growing area of federal litigation. The facts presented here are indicative of the myriad of new situations now brought to lower Federal Courts for determinations under 42 U.S.C. §1983 and related sections. More definitive guidelines are required for the applicability of these sections than currently exist.

Although the petitioner contends that the decisions of the District Court and the Sixth Circuit below conflict with the past interpretations given by this Court in its considerations of the phrase "under color of law," a clear definition of those words has yet to be established. In *Monroe v. Pape*, 365 U.S. 167 (1961); *Screws v. United States*, 325 U.S. 91 (1945); and *United States v. Classic*, 313 U.S. 299 (1941), this Court was not confronted with allegations of such a tenuous attachment to official action as suggested here by the mere existence and use of a weapon authorized by the actor's office. Rather, those cases involved situations where the defendants had clearly embarked upon the pursuit of their official duties and, while performing those duties, committed wrongful and unauthorized acts.

Although as recognized in *Monroe v. Pape, supra*, the words "under color of" law or state authority may not lend themselves to precision in the law, the danger of a continuing uncertainty in the application of that phrase is evidenced by the opinions of the District Court and the Sixth Circuit in the instant case which broaden the scope of 42 U.S.C. §1983 and, at the very least, create implications for its unwarranted extension. To focus merely upon official nature of the weapon used to alone raise the inference that it was used "under color of law"

or other authority would easily extend the statute's application to encompass any accidental discharge of the weapon by an off-duty officer or even its use in purely criminal conduct which sets in total opposition to the user's authority or duty. Such an interpretation would virtually emasculate the well recognized exclusion of private conduct set forth in the *Civil Rights Cases*, 109 U.S. 3 (1883) from within the ambit of the Act.

Furthermore, the suggested extension of the "under color of law" doctrine by the lower courts in this case would be cause for great concern in the administration of police departments and law enforcement agencies throughout the United States. Thousands of police officers in this country carry weapons while off-duty pursuant to regulations of their respective agencies. The purpose of these regulations is to provide these agencies with the capability of obtaining an instant response when emergencies require supervisors to call off-duty personnel to an on-duty status. An added purpose is to provide off-duty officers with a means of self-defense against individuals who may wish them harm by reason of the special nature of their employment.

If a ready response to criminal emergencies is to be maintained by local police agencies and if officers are going to continue to have an adequate means of personal self-defense, then it is vitally necessary for this Court to establish guidelines containing a modicum of specificity which would indicate just when the use of these weapons would be considered to be "under color of law" and which would insure that the private use of these weapons would not be brought within the reaches of 42 U.S.C. §1983 and thereby subject the officer and his supervisors to federal civil damage suits, as has occurred in this case.

The decisions below reflect an unwarranted extension

of 42 U.S.C. §1983 into an area not recognized by this Court and profoundly affect the administration of local police agencies throughout the United States.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 75-1075

[Caption omitted in printing]
filed September 16, 1975

JUDGMENT

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Plaintiffs-Appellees recover from Defendants-Appellants the costs on appeal, as itemized below, and that execution therefor issue out of said District Court if necessary.

Entered by Order of the Court.
JOHN P. HELMAN, *Clerk*

Issued as Mandate: October 15, 1975

COSTS: None
Filing fee ..... $_____
Printing ..... $_____

Total $_____

No. 75-1075

United States Court of Appeals

FOR THE SIXTH CIRCUIT

[Caption omitted in printing]

Decided and Filed September 16, 1975.

Before: PHILLIPS, Chief Judge, WEICK and PECK, Circuit Judges.

WEICK, Circuit Judge. The suit in the court below arose out of an incident in Jimmy's Cafe in Columbus, Ohio at about 1:30 A.M., on March 1, 1971 in which Raymond L. Belcher, an off-duty policeman, shot and killed two young men and paralyzed a third while acting under color of law.

The suit was brought under authority of 42 U.S.C. §§ 1983 and 1985 for violation of the civil rights of the plaintiffs to due process and equal protection of the laws: *Cf. Smartt v. Lusk*, 373 F. Supp. 102 (E.D. Tenn. 1973), *aff'd*, 492 F.2d 1244 (6th Cir. 1974).

The plaintiffs in the case were Casey D. Stengel, a 22 year old man who was shot in the back, the bullet penetrating his spine and paralyzing him, and the administrators of the estates of the other two deceased men. The defendants were Officer Raymond L. Belcher, the City of Columbus, and a number of other police officers who were alleged to have conspired to cover up the facts concerning the shootings.

The District Court granted the motion to dismiss of the City of Columbus. The case was tried to a jury. At

the close of the plaintiffs' case in chief the District Court granted the motions of the defendants, the police officers, other than Belcher, for a directed verdict and dismissed them from the case. The case then proceeded against the remaining defendant, Raymond L. Belcher, resulting in verdicts against him in favor of all of the plaintiffs.

The jury awarded Noe's estate $9,000 in compensatory damages and $1,000 in punitive damages, Ruff's estate $19,000 in compensatory damages and $1,000 in punitive damages, and Stengel $800,000 in compensatory damages and $1,000 in punitive damages. Belcher has appealed. We affirm.

Briefly, the evidence disclosed that at approximately 1:00 A.M., on March 1, 1971, Stengel, Ruff and Noe entered Jimmy's Cafe. Stengel, Ruff and Noe were in their early twenties. They recognized one of the other customers, Mrs. Agnes Morgan. She introduced them to her husband, Kyle, and Stengel and Noe decided to play a game of "bowling" with Mr. and Mrs. Morgan for a beer. After the game, Stengel took a seat at the bar. A dispute developed between Noe and the Morgans. Mrs. Morgan slapped Noe in the face and Noe slapped her back. The dispute escalated and the evidence as to what happened is sharply in conflict but it is undisputed that none of the young men were armed.

Belcher, who, as before noted, was off duty and out of uniform, had previously entered the bar with his girlfriend and they had seated themselves with another couple in one of the booths. Belcher was equipped with a can of mace and a 32 caliber revolver which police regulations required him to carry at all times. Without identifying himself as a police officer at any time, Belcher involved himself in the altercation. Belcher claimed that he was attacked by Stengel, Ruff and Noe. His girlfriend

and the other couple in the booth corroborated his story. Stengel testified that Belcher was holding Ruff from behind, at which point Stengel grabbed Belcher and pushed him down to the floor. On the way down, Belcher was spraying Stengel in the face with the mace.

Belcher and other witnesses testified that Stengel, Ruff and Noe were "stomping" him. Stengel testified that he only kicked at the chemical mace in Belcher's hand when Belcher was on the floor and that Ruff and Noe were not doing anything to Belcher. Belcher drew his gun and shot Ruff in the chest, the bullet passing through his heart, and he shot Stengel in the back. The bullet entered Stengel's spinal canal and he was immediately paralyzed. There is some dispute whether Noe was shot inside or outside the bar. He was found on the sidewalk outside the cafe where Belcher had chased him. He was shot in the chest. Belcher testified that he grappled with Noe outside of the bar and struck him in the face with his gun and it went off.

A police laboratory report disclosed that Stengel was shot from a distance of 6 to 10 inches, Ruff from a distance of 12 to 20 inches and Noe from a distance of 6 inches.

Belcher testified that in the cafe he fired his pistol three times in the air.

Belcher contends that there is insufficient evidence to support the jury's finding, implicit in its verdict, that Belcher was acting under color of state law at the time of the incident in Jimmy's Cafe. He contends that the evidence shows that he was engaged in private social activity, was out of uniform and off duty and never identified himself as a police officer. In other words, he contends that his actions were taken as a private citizen. Acts of police officers in the ambit of their personal,

private pursuits fall outside of 42 U.S.C. §1983. *Monroe v. Pape*, 365 U.S. 167, 185 (1961); *Screws v. United States*, 325 U.S. 91, 111 (1945).

However, [a]cts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it." *Screws, supra*, at 111. The fact that a police officer is on or off duty, or in or out of uniform is not controlling. "It is the nature of the act performed, not the clothing of the actor or even the status of being on duty, or off duty, which determines whether the officer has acted under color of law." *Johnson v. Hackett*, 284 F. Supp. 933, 937 (E.D. Pa. 1968). See *Robinson v. Davis*, 447 F.2d 753 (4th Cir. 1971), *cert. denied* 405 U.S. 979 (1972).

The chemical mace which Belcher sprayed was issued to him by the Columbus police department. Belcher carried his pistol pursuant to a regulation of the police department which required off-duty officers to carry pistols as well as mace at all times.

Although Belcher testified that he was attacked while trying to go outside of the bar to telephone police,[1] Stengel testified that Belcher grabbed Robert Ruff from behind, around the neck and waist, after the dispute between Ruff, Noe and the Morgans had begun. There was other evidence which permitted an inference that Belcher, although he overstepped the bounds, intervened in the dispute pursuant to a duty imposed by police department regulations.

Dwight Joseph, who was the chief of police at the time of the incident, testified that a police officer was required to take action "in any type of police or criminal activity 24 hours a day." Chief Joseph further testified:

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[1] Belcher was impeached on this point by his prior inconsistent statement.

A. They would be subject to discipline if they didn't take action.

. . . .

Q. Did Raymond Belcher act under the authority of those regulations in the incident that's here involved?

A. Yes, sir.

The record contains a letter dated April 8, 1971 written to Officer Belcher by the Director of the Department of Public Safety, Mr. James J. Hughes,[2] which closed the inquiry of the Police Firearms Board of Inquiry by exonerating Belcher. In relevant part, the letter states: "The inquiry is hereby closed with a specific finding that your actions were in line of duty . . . ." Officer Belcher also received workmen's compensation on the ground that he was "in line of duty under circumstances relating to police duties."

The plaintiffs-appellees contend that the District Court should have decided, as a matter of law, that Officer Belcher was acting at the time under color of state law, in view of an admission by his counsel in open court to that effect and the undisputed testimony. We agree. Out of an abundance of caution, the District Court submitted this factual issue to the jury for its determination. We see no objection to this procedure and hold that the evidence abundantly supports the jury's verdict.

It is not understandable to us why Officer Belcher, instead of entering into the affray, grabbing one of the participants from behind and spraying mace, did not announce to the participants that he was a police officer and demand that they desist in their altercation. This

[2] Mr. Hughes as City Attorney acted as counsel for Belcher at the trial.

might have prevented injury to anyone. It appears to us that Belcher, as a police officer, used poor judgment.

Belcher's next contention is that the District Court erred in excluding evidence proferred of allegedly similar incidents involving Ruff, Noe and Stengel. Among other purposes, he claims that the evidence was admissible on the issue of who was the aggressor in the incident involved in the case at bar.[3] Incidentally, the Court also excluded evidence of similar incidents proffered by plaintiffs involving Belcher.

Belcher sought to introduce testimony by several people concerning four previous incidents in which Ruff, Noe and Stengel allegedly entered bars and caused trouble. One of the incidents allegedly happened earlier on the night of February 28, 1971, the night on which the three men were shot.

The proffer indicated that most of the witnesses would testify that in the other bars the trio was loud, abusive, profane, and that they attempted to cause trouble.

In addition, assuming that Belcher was acting under color of state law, the primary issue was whether Officer Belcher used excessive force, and not who was the first aggressor.

The appellees indicated that the proffered testimony would have been controverted, thus, introducing disputes over collateral issues, with the attendant possibility of confusion of issues and the certainty that the trial would be prolonged. The proffered evidence in no event would have been admissible on the issue of self defense because there is no proof that at the time of the shootings Belcher had any knowledge of the proffered incidents.

[3] Belcher contends that the evidence is also admissible to prove a number of other matters, including intent, knowledge, habit, etc., none of which are shown to be material to the case. The same could be said about Belcher's conduct on other occasions.

Finally, we observe that the proffered circumstantial evidence would have been cumulative, since Belcher's version of the incident is supported by direct evidence, the testimony of his girlfriend and the other couple who had been with them in the booth, although the jury chose not to believe the testimony.

Even when evidence is otherwise relevant and admissible, under the circumstances of this case the trial court had discretion to exclude it. The trial court has the duty to weigh the probative value of the evidence against the possibility of prejudice, confusion of issues, and waste of time, especially where the case is tried before a jury. *Smith* v. *Spina*, 477 F.2d 1140, 1146 (3rd Cir. 1973); *Olin-Mathieson Chem. Corp.* v. *Allis-Chalmers Mfg. Co.*, 438 F.2d 833, 838 (6th Cir. 1971); *In re Compudyne Corp.*, 255 F.Supp. 1004, 1008 (E.D. Pa. 1966).

Rule 403 of the new Federal Rules of Evidence, which would be applicable if a new trial were ordered, is described in the Advisory Committee's Note as finding "ample support in the authorities." The rule states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time or needless presentation of cumulative evidence.

In light of the marginal probative value of some of the proffered testimony, its cumulative nature, its tendency to introduce collateral issues and prolong the trial, the District Court did not abuse its discretion in excluding the testimony proffered by Belcher. We note, parenthetically, that the District Court applied its discretion evenhandedly in this regard.

As before stated, the court also excluded evidence

which the plaintiffs sought to introduce which involved 46 "Use of Force" reports prepared and filed by Belcher with the police department, and an incident which occurred at Jimmy's Cafe on December 14, 1971, in which he struck another man in the presence of his girlfriend.

Belcher further contends that the District Court erred in admitting Stengel's medical records without supporting expert testimony concerning the cause, nature, extent and duration of his injuries and the reasonableness and necessity of the medical bills, which were admitted as part of the medical records.

The medical records in question are Stengel's medical records from Riverside Hospital, where he was admitted after the shooting and subsequently, and from the Ohio State University Hospitals, where he was admitted for rehabilitation and for treatment of medical problems which developed as the result of his paraplegia. Without going into detail, these records indicate that he has had no meaningful return of neurological function in the affected parts of his body, and they also indicate resulting medical problems, including treatment of decubitus ulcers, a suprapubic cystostomy, and an osteotomy of the right proximal femur with a resection of myostic bone block.

There is no question concerning the duration of Stengel's injuries. First, Clifford Stengel, Casey's father, testified without objection that Dr. Rossel of Riverside Hospital had told him that there was practically no chance that Casey would walk again. Second, the final pretrial order stated as an uncontroverted fact established by admission or stipulation that Casey Stengel's injuries were permanent. (Uncontroverted Fact 4). At trial, Stengel's counsel stated to the jury, without objection by the defense, that the parties had stipulated that

the injuries were permanent. The parties also stipulated the mortality tables.

The medical records are Joint Exhibits 68 and 69. At trial, these records were identified by their respective custodians. When the plaintiffs moved admission of the medical records, the defense objected but not on the ground that they had not been properly identified specifically, stating:

> MR. HUGHES: Joint Exhibits 68 and 69, Your Honor, our objection to them is there has been no medical testimony as to cause of action, that they are — there are matters contained in there that are not connected.

The Court admitted the records over the objection.

The Court instructed the jury concerning past and future medical expenses. As Fed. R. Civ. Pro. 51 requires, the Court afforded counsel an opportunity to object to the charge out of the presence of the jury. Defense counsel stated that he had no objection to the entire charge.

Under Ohio law, a physician's diagnosis made in the course of his patient's treatment and contained in a hospital record is admissible as part of a business record. Ohio Revised Code § 2317.40; *Weis* v. *Weis*, 147 Ohio St. 416, 425 (1947). Because the diagnoses contained in the hospital records and the notations of treatments were admissible under Ohio law, they are likewise admissible in a federal court sitting in Ohio. Fed. R. Civ. Pro. 43(a).

Therefore, it is unnecessary to determine whether the hospital records, including diagnoses, would be admissible under the provisions of 28 U.S.C. § 1732(a), as that section read at the time of trial. *Cf. Willmore* v. *Hertz Corp.*, 437 F.2d 357, 359 (6th Cir. 1971). See Rule 803(6) of the Federal Rules of Evidence.

Assuming that a proper foundation is laid, diagnoses

contained in hospital records of a patient's treatment are admissible under the Ohio business records exception to the hearsay rule. The defendant-appellant objected on the specific ground that the plaintiffs had offered no expert medical testimony. The expert medical testimony was contained in the hospital records. Apparently, the defendant believed that diagnoses contained in medical records must be supported by expert testimony at trial. The business records exception contains no such requirement. See 16 O.Jur. 2d Rev. "Damages" § 55.

The specific objection made is effective only to the extent of the grounds specified in the objection. 1 *Wigmore on Evidence* § 18; *Williams* v. *Union Pacific R.R.*, 286 F.2d 50, 55 (9th Cir. 1960); *Norwood* v. *Great American Indemnity Co.*, 146 F.2d 797, 800 (3rd Cir. 1944). The grounds specified are, as we have held, untenable.

With respect to past and future medical expenses, the defendant failed to object to the Court's charge to the jury, although he was afforded an opportunity to object if he wanted to.

Fed. R. Civ. Pro. 51 reads, in part:

> No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

Having declined to object to the Court's charge concerning past and future medical expenses, Belcher may not now raise the contention that the evidence was insufficient to submit the question of such damages to the jury.

Certainly, Belcher's contention does not fall within the limited exception to the requirement of an objection recognized in *Batesole* v. *Stratford*, 505 F.2d 804, 808

(6th Cir. 1974). The issue does not go to the heart of the case, nor it is a vital one which is decisive of the parties' rights.

Belcher next contends that the jury's verdict is not supported by the evidence; that the plaintiffs did not pray for punitive damages and that the evidence does not support an award of punitive damages; that the amounts of damages are grossly excessive; and that the court erred in failing to instruct the jury to disregard certain evidence.

Concerning liability, the verdict is supported by the overwhelming evidence. The minor injuries consisting of bruises and cuts received by Belcher on his face which did not require hospitalization do not support his claim of self defense or justify his use of excessive force in killing two young men and permanently maiming a third. Concerning punitive damages, plaintiffs' counsel moved orally to amend the complaint to ask for punitive damages. Fed. R. Civ. Pro. 15(b). At with other issues which Belcher has raised, he did not object to the Court's instruction concerning punitive damages. Our observations concerning this failure, *supra*, are likewise applicable here. Stengel's testimony, in conjunction with the fact that the bullets were fired from close range without warning into vital parts of the victims' bodies, supports the award of punitive damages.[4]

Belcher further contends that the damages recovered by the plaintiffs are not supported by the evidence and are grossly excessive. The District Court rejected this contention in denying Belcher's motion for a new trial.

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[4] Punitive damages may be recovered in actions under 42 U.S.C. § 1983. *McDaniel v. Carroll*, 457 F.2d 968 (6th Cir. 1972), *cert. denied*, 409 U.S. 1106 (1973); *Basista v. Weir*, 340 F.2d 74, 87 (3rd Cir. 1965).

In the absence of a showing of bias, passion, or corruption on the part of the jury, excessiveness of the jury's verdict is a question primarily addressed to the trial court's discretion. On appeal, this court considers only whether the trial court has abused its discretion. *Shepherd* v. *Puzankas*, 355 F.2d 863, 865 (6th Cir. 1966); *Kroger Co.* v. *Rawlings*, 251 F.2d 943, 945 (6th Cir. 1958).

It is undisputed that Noe and Ruff lived for approximately 45 minutes after they were shot. (Document 58, page 6 of record on appeal, which is Belcher's motion for a new trial uses this figure). There is evidence that both were conscious during this period. Ruff was survived by his widow. He was employed as a cab driver. His claims involved both wrongful death and surivorship. In our opinion, the trial court did not abuse its discretion in deciding that these damages were not grossly excessive.

Understandably, Belcher's attention is directed primarily to Stengel's recovery of $800,000 in compensatory damages. In our opinion, these damages are also supported by substantial evidence, and the District Court did not abuse its discretion in holding that the damages were not grossly excessive.

Stengel was 22 years old when he was shot. The parties stipulated that his life expectancy at that time was 40 years. He was a veteran and had been accepted by Ohio State University for enrollment during the Spring quarter of 1971. He had previously been employed as a mail clerk with the U.S. Post Office. Stengel attempted to continue his education after he was released from the hospital by attending Franklin University, but was unable to do so because of decubitus ulcers which developed as the result of sitting.

Stengel testified concerning the care that he was then

receiving from his housekeeper. and his father, Clifford Stengel, testified concerning the assistance which Casey required in everyday matters, such as putting on some of his clothes, or getting to the bathroom and back.

The testimony concerning his pain from the time of the shooting was extensive. He testified to intense pain as he lay in the hospital immediately after he was shot. He testified that his pain continued, due to complications, while he was in the hospital and after he was released from the hospital. Pain from various conditions resulting from his immobility continued at least until the time of trial and the jury could infer that he would continue to have such pain in the future.

Stengel's injuries were stipulated to be permanent. It was no doubt obvious to the jury from the testimony and from seeing him, that he had lost the ability to walk, to eliminate normally, and, probably, to enjoy a normal married life. He testified that his problems were at least partly responsible for his separation and subsequent divorce from his wife. Such matters, the jury could infer, would result in future mental anguish.

Although Belcher contends that the verdict is the result of bias, prejudice or passion, we have examined the record and are unable to find any such evidence.

Finally, Belcher contends that the District Court erred in failing to give a requested instruction which instructed the jury to disregard certain matters both as to liability and damages. Belcher claims that the testimony to which the instruction refers was admitted only in support of the conspiracy claim, which the Court dismissed after the close of plaintiffs' case.

Belcher was not entitled to the requested instruction, since it would have withdrawn at least part of Stengel's pain and suffering while awaiting treatment at the hospi-

tal. The Court properly instructed the jury that Stengel could recover damages only for injury suffered as a proximate result of the shooting, and for future damages which were reasonably certain to occur. Belcher did not object to the charge as given and, for the reasons noted earlier, he cannot raise this issue on appeal. Fed. R. Civ. Pro. 51.

Affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action 72-67

[Caption omitted in printing]
filed March 19, 1973

OPINION AND ORDER

This matter is before the Court on defendants' motion to dismiss the complaint for failure to state a claim upon which relief can be granted and for lack of jurisdiction over the subject matter.

The twenty-five defendants in this action have filed five separate but related motions.

1. A motion by defendant Raymond Belcher to dismiss the complaint as to him because the Court lacks jurisdiction over the subject matter and because the complaint fails to state a claim against him upon which relief can be granted.
2. A motion by defendant Dwight Joseph to dismiss the action as to him because the Court lacks jurisdiction over the subject matter and because the complaint fails to state a claim against him upon which relief can be granted.
3. A motion by defendant City of Columbus to dismiss the action against it because the Court lacks jurisdiction over the subject matter and because the complaint fails to state a claim against it upon which relief can be granted.
4. A motion on behalf of the twelve John Doe defendants to dismiss the action as to them because the Court lacks jurisdiction over the subject matter and over the person and because the complaint fails to state a claim against them upon which relief can be granted.

5. A motion on behalf of the ten remaining defendants to dismiss the action as to them because the Court lacks jurisdiction over the subject matter and because the complaint fails to state a claim upon which relief can be granted.

This action was commenced under the provisions of Title 42, United States Code, Sections 1983 and 1985. Jurisdiction of the Court is invoked under Title 42, United States Code, Sections 1331 and 1343.

Plaintiff Stengel contends that he was assaulted by defendant Raymond Belcher during a barroom altercation and, as a result of that assault, was paralyzed. The two other plaintiffs were killed. Plaintiffs contend that the remaining defendants conspired to cover up the incident. Defendant Raymond Belcher is a police officer for the City of Columbus. However, he was not officially on duty at the time the assault occurred. The remaining defendants are police officers and supervisory personnel of the Columbus Police Department.

Each of the defendants' motions will be considered separately.

1.

Section 1983 provides that any person who while acting under the color of state law deprives another of any right, privilege or immunity secured by the Constitution or laws of the United States shall be liable to the injured party. Therefore, plaintiffs must both allege and prove that defendants were acting under color of state law. Defendant Raymond Belcher contends that the complaint should be dismissed as to him because he was not acting under color of state law at the time of the assault.

The Court has carefully examined the allegations in the complaint. The complaint does allege that defendant Raymond Belcher was acting under color of state law.

Defendant Belcher contends that since he was not technically on duty when the assault occurred he could not have been acting under the color of state law. However, this is not necessarily true. *See Johnson* v. *Hackett*, 284 F.Supp. 933 (E.D. Pa. 1968).

Whether or not plaintiff will be able to prove that defendant Raymond Belcher was acting under color of state law is not at issue here. Rather, the motions filed on behalf of this defendant attack the sufficiency of the allegations in the complaint. Viewing the allegations in the complaint in the light most favorable to plaintiff, the Court determines that they are sufficient to withstand a motion to dismiss for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted.

WHEREUPON, the Court determines that this motion is without merit and it is therefore DENIED.

2.

Defendant Joseph contends that this Court does not have jurisdiction over the subject matter because defendant Raymond Belcher was not acting under the color of state law. However, as noted above, this argument is without merit. Defendant Joseph also contends that the complaint fails to state a claim upon which relief can be granted against him because he cannot be held liable under the theory of respondeat superior in a § 1983 action. There are a number of cases which have adopted this position. *See, e.g., Jordan* v. *Kelly*, 223 F.Supp. 731 (W.D. Mo. 1963). However, the complaint in this action also alleges that defendant Joseph participated in the conspiracy to cover up this incident. Therefore, the Court believes that he should not be dismissed as a party to this action.

WHEREUPON, the Court determines that the motion is without merit and is therefore DENIED.

3.

The City of Columbus contends that since it is not a "person" within the meaning of Section 1983, then it cannot be made a party to this action. In *Monroe* v. *Pape*, 365 U.S. 167 (1961), the Supreme Court held that in an action for money damages a municipal corporation is not a "person" within the meaning of Section 1983. To this extent, the motion by the City of Columbus is meritorious. However, plaintiffs also seek injunctive relief against the City of Columbus. Plaintiffs seek to enjoin enforcement of a regulation of the Columbus Police Department which requires all off duty officers to carry firearms. This Court does not interpret *Monroe* v. *Pape*, *supra*, to bar an action against a city for injunctive relief. *See* C. Antieau, Federal Civil Rights Acts § 37 (1971).

WHEREUPON, the Court determines that the motion is without merit and it is therefore DENIED.

4.

The fourth defense motion is a motion on behalf of the twelve John Doe defendants to dismiss the complaint as to them. The complaint alleges that these defendants participated in the conspiracy to cover up the incident. For the reasons stated elsewhere in this opinion, the Court believes that the allegations in the complaint are sufficient to withstand a motion to dismiss for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted. However, these defendants also contend that the complaint should be dismissed as to them for insufficiency of service of process.

The Court notes that these defendants have not been served with process because their real identity has not yet been determined. Therefore, the Court will reserve a ruling on this motion until after the completion of discovery.

5.

The last defense motion to dismiss which was submitted by the ten remaining defendants who allegedly participated in the conspiracy to cover up the incident asserts that this Court lacks jurisdiction over the subject matter because defendant Raymond Belcher was not acting under the color of state law at the time of the assault. However, as noted above, this argument is without merit. Defendants further contend that the complaint fails to allege sufficient facts to establish a conspiracy under §1983. The complaint alleges that these defendants attempted to whitewash the incident by filing unfounded charges against plaintiff Stengel, intimidating witnesses, failing to immediately examine defendant Raymond Belcher for intoxication, releasing inaccurate stories to the news media and other actions designed to cover up the incident. While these activities would not be sufficient to sustain a claim for relief under 42 U.S.C. §1985 in that plaintiff has not alleged that the discrimination was class based, *see Griffin* v. *Breckenridge*, 403 U.S. 88, 102 (1971), the Court does believe that the allegations in the complaint state a claim for relief under §1983. *See Mizell* v. *North Broward Hospital District*, 427 F.2d 468 (5th Cir. 1970).

WHEREFORE, the Court determines that this motion is without merit and it is therefore DENIED.

JOSEPH P. KINNEARY, Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action 72-67

[Caption omitted in printing]
filed March 19, 1973

OPINION AND ORDER

This matter is before the Court on plaintiffs' motion for summary judgment under the provisions of Rule 56 of the Federal Rules of Civil Procedure and defendants' motion to strike plaintiffs' summary judgment motion under the provisions of Rule 12(f) of the Federal Rules of Civil Procedure.

Plaintiffs in this action contend that they are entitled to summary judgment on the issue of whether the defendants were acting under color of state law. Rule 56 provides that summary judgment is appropriate where there is no genuine issue of fact and the moving party is entitled to judgment as a matter of law. In this case defendants have denied that the principal defendant in this action was acting under color of state law. Therefore, a contested issue of fact exists and summary judgment is clearly inappropriate. *Rogers* v. *Peabody Coal Co.*, 342 F.2d 749 (6th Cir. 1965); *Bailey* v. *American Tobacco Company*, 462 F.2d 160 (6th Cir. 1972).

Defendants' motion to strike plaintiffs' motion for summary judgment will also be denied. However, the Court takes this opportunity to remind counsel that they are to act in a professional manner in all matters before this Court. The Court will not tolerate the emotional attacks which have characterized this action to date.

WHEREUPON, the Court determines that the motions are without merit and they are therefore DENIED.

JOSEPH P. KINNEARY, Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Civil Action 72-67

[Caption omitted in printing]
filed September 11, 1974

ORDER

This matter is before the Court on plaintiffs' motion for substitution of party plaintiff and on defendant's post-trial motions. Defendant has filed no memorandum contra to plaintiffs' motion. Plaintiffs have filed memoranda contra to defendant's motion, and defendant has filed a reply to plaintiffs' memoranda.

Plaintiff moves to substitute Albert J. Leshy as administrator for the estate of Michael J. D. Noe. The motion is filed pursuant to Rule 25, Fed. R. Civ. Proc. Leshy would be substituted for Timothy Noe, who has been named as administrator of Michael J. D. Noe's estate, but who died since the commencement of the action. Timothy Noe's death was suggested on the record of the case at trial which commenced on June 10, 1974. Plaintiffs' motion was filed August 12, 1974. It was timely filed.

Rule 14(b), Rules of the United States District Court, Southern District of Ohio, states that:

> Upon the filing of the motion, memorandum and certificate, any memorandum contra shall be filed within twenty (20) days from the date of filing. Failure to file a memorandum contra may be cause for the Court to grant the motion as filed.

Plaintiff's motion was filed on August 12, 1974. More

than twenty days has elapsed since the filing of the motion.

Plaintiffs' motion is GRANTED.

Defendant timely moves for a judgment notwithstanding the verdict. The motion is filed pursuant to Rule 50(b), Fed. R. Civ. Proc. He also moves for a new trial or an altering or amending of the judgment. These motions are filed pursuant to Rules 59(a) and (e), Fed. R. Civ. Proc. Both of the Rule 59 motions have been timely filed. Because defendant moved for a directed verdict at the close of all the evidence, his motion is properly taken.

Defendant's motions are DENIED.

WHEREUPON, the Court determines the plaintiffs' motion to substitute a party plaintiff to be meritorious and it is therefore GRANTED, and defendant's motions for a judgment notwithstanding the verdict, for a new trial and for an altering or amending of the judgment to be without merit and they are therefore DENIED.

JOSEPH P. KINNEARY, Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action 72-67

[Caption omitted in printing]
filed February 28, 1972

COMPLAINT

1. Jurisdiction of this Court is invoked under the Fourteenth Amendment, United States Constitution and Title 28, United States Code Sections 1331 and 1343 and Title 42, United States Code Sections 1983 and 1985.

2. The matter in controversy exceeds the sum or value of Ten Thousand Dollars, exclusive of interest and costs.

FIRST CLAIM

3. During all times herein mentioned, Plaintiff, Casey D. Stengel and Plaintiffs' decedents, Robert D. Ruff and Michael J. D. Noe, were citizens of the United States residing in the City of Columbus, County of Franklin, and State of Ohio, and Plaintiff, Casey D. Stengel, is of full age. Plaintiff, Charles Ruff, is the duly qualified and acting Administrator of the Estate of Robert D. Ruff, and brings this action on behalf of the wife and the next of kin of said decedent who would be entitled to inherit under the Ohio statutes of descent and distribution. Plaintiff, Timothy Noe, is the duly qualified and acting Administrator of the Estate of Michael J. D. Noe, and brings this action on behalf of the next of kin of said decedent, Michael J. D. Noe, who would be entitled to inherit from Michael J. D. Noe, pursuant to the Ohio statutes of descent and distribution.

4. During all times mentioned herein, defendant, Dwight Joseph, was the duly appointed, qualified and presently acting Chief of Police in charge of the police force of the City of Columbus, Ohio.

5. During all times mentioned herein, defendants, Raymond L. Belcher, John Hawk, Francis B. Smith, Robert Taylor, Richard O. Born, Earl Belcher, Detective Sgt. P. Hopkins, James Newell, E. R. Woods, E. Young, M. Hardin and John Doe defendants, one through twelve, were duly appointed, qualified and acting police officers or administrative officials of the Police Department of the City of Columbus, a municipal corporation of the State of Ohio, and were agents of the said City acting or purporting to act in the course of their employment and engaged or purported to be engaged in the performance of their duties as police officers or administrative officials of said City and acting pursuant to orders, directives and regulations of said Police Department and orders and directives from defendant, Dwight Joseph, Police Chief of the City of Columbus, and all the conduct of all the defendants in connection with facts alleged in this Complaint has been ratified and condoned by defendant, The City of Columbus, through acts and conduct of its Chief Police Officer, Dwight Joseph and other duly authorized supervisory personnel. Defendant Police Lieutenant Earl Belcher is believed to be a blood relative of defendant, Raymond L. Belcher.

6. During all times herein mentioned the defendants and each of them were persons acting under color of the statutes, ordinances, regulations, customs and usages of the State of Ohio, County of Franklin, and The City of Columbus.

7. The City of Columbus at all times herein mentioned was the employer of the other defendants and

each of them. Said City at all times herein mentioned provided the individual defendants and each of them with an official badge and identification card which designed and described its bearer as Police Chief or officer of said City's Department of Police. During all times herein mentioned The City of Columbus by police regulation ordered off-duty policemen to carry arms at all times based on the theory that said police officers and police chief are on duty 24 hours of each day.

8. On or about March 1st, 1971, at approximately 1:30 a. m., Plaintiff, Casey D. Stengel, in company with Robert D. Ruff and Michael J. D. Noe who are the other plaintiffs' decedents, were all patrons at a tavern known as Jimmie's Cafe, 2338 Summit Street in the City of Columbus, Ohio, when an argument developed between Michael J. D. Noe, one of the other plaintiffs' decedent, and two other patrons at the Cafe, Cal Morgan and Agnes Morgan, husband and wife, and as the result of this argument about a bowling game, Agnes Morgan struck said Michael J. D. Noe which then developed into a minor altercation involving words and pushing between Cal Morgan and his wife, Agnes Morgan, on the one hand, and both of Plaintiffs' decedents, Robert D. Ruff and Michael J. D. Noe on the other; said activity involving no serious assaults of any kind. Almost immediately after the argument and minor altercation heretofore described commenced, defendant, Raymond L. Belcher, who was out of uniform and in no way identified as a Columbus policeman, and in no way involved in the minor dispute heretofore described, intervened by attacking one of plaintiffs' decedent from the rear by grabbing him around the neck from the rear; said intervention by said Raymond L. Belcher being without any notification or attempt to notify anybody in the Cafe that

he was an off-duty Columbus policeman and without any attempt by said Raymond L. Belcher to make a police arrest or a citizen's arrest of any kind; at this point, Plaintiff, Casey D. Stengel, came to the assistance of his companions, the other Plaintiffs' decedents by pulling Raymond L. Belcher from the back of one of Casey D. Stengel's said companions and thereafter Plaintiff, Casey D. Stengel, attempted to kick the chemical mace equipment which Raymond L. Belcher pulled from his clothing and which was blinding and choking the people involved from the hand of said Raymond L. Belcher; whereupon still without any warning, identification, or attempt to make an arrest, said Raymond L. Belcher, pulled a gun from his clothing which gun he was ordered and directed to carry as an off-duty Columbus policeman and shot one of the Plaintiffs' decedent, to-wit: Robert D. Ruff, which shooting caused the death of said Robert D. Ruff shortly thereafter and in the space of a couple of seconds thereafter, defendant, Raymond L. Belcher, shot Plaintiff, Casey D. Stengel, in the back as he had turned to get away from the chemical spray and to determine if other outsiders in the bar were going to make further intervention in the original argument; said shot by Raymond L. Belcher, hitting, Plaintiff, Casey D. Stengel, in the back in his spinal cord and causing Plaintiff, Casey D. Stengel, immediate and permanent paralysis of the lower part of his body which has caused Plaintiff to lose control of bodily functions of his body below where the bullet entered his spine and that such loss which is permanent includes but is not limited to the power to walk, the power to control his function of urinating and the power to fully control the function of defecation; within seconds thereafter defendant, Raymond L. Belcher, pursued Plaintiff decedent, Michael J. D. Noe, who was

trying to depart from the front door of the Cafe and shot said Plaintiff decedent, Michael J. D. Noe, from which shooting said Michael J. D. Noe died shortly thereafter.

9. Defendant, Dwight Joseph, as Police Chief of defendant, The City of Columbus, enforces the regulations and policies of the City of Columbus requiring off-duty, out-of-uniform police officers to carry guns and he and The City of Columbus knew or in the exercise of ordinary care and foresight should have known that off-duty police would drink hard liquor in bars which would adversely affect their judgment and control and emotions and that unjustified killings and serious injury as heretofore described in this Complaint would occur. By reason of all the foregoing facts heretofore recited in this Complaint, defendants, Raymond L. Belcher, Dwight Joseph and The City of Columbus acting under color of law and under the customs and usages of the Municipal Corporation of Columbus, Ohio, have deprived Plaintiff, Casey D. Stengel, of rights, privileges and immunity secured to him by the Constitution and Laws of the United States and particularly his rights to equal protection of the laws and to due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

10. Plaintiff, Casey D. Stengel, alleges that as a direct and proximate result of the acts of the defendants, Raymond L. Belcher, Dwight Joseph and the Municipal Corporation of Columbus, Ohio, heretofore, described, he has suffered permanent physical disability in that by reason of the shooting in the back in the spine he is permanently paralyzed from the waist down as heretofore described; that he has suffered much discomfort and pain, embarrassment and that he will be confined to a wheelchair for the rest of his life and that in addition

thereto vital functions of his body have been impaired to the extent that he will require permanent care and assistance by others to continue to live; and that he will suffer pain and discomfort and humiliation during the remainder of his life, and that he cannot sleep comfortably in a normal position because of sores that develop on his back and rectal area because of lack of bowel control which sores have since the incident forced him to discontinue an attempt that he has made to proceed with an educational program; that his earning capacity has been totally impaired, that he will continue to incur major expenses for medical care and treatment as he has in the past; that prior to the incident heretofore described Plaintiff, Casey D. Stengel, had honorably performed his military obligation to the United States having attained the rank of sergeant in Vietnam and having received the Purple Heart and two Bronze Stars for combat activity and that he had been honorably discharged from his military obligations and that after brief employment at the United States Post Office, had applied for admission for education at Ohio State University and had been accepted and would have started his college education the spring quarter of 1971 had not the incident heretofore described occurred. Plaintiff further alleges that prior to this incident he was 22 years of age and in excellent health and had a normal life to look forward to including association with a four-year old son and that by reason of the facts heretofore described defendants, have in effect, taken 90% of his life.

11. WHEREFORE, Plaintiff, Casey D. Stengel, claims damages of the defendants, Raymond L. Belcher, Dwight Joseph and The City of Columbus in the amount of ONE MILLION DOLLARS as compensatory damages and in an amount of FIVE HUNDRED THOUSAND

DOLLARS as punitive damages in the First Claim herein.

SECOND CLAIM

12. Plaintiff, Casey D. Stengel, incorporates and realleges paragraphs numbered one through nine of this Complaint as if fully rewritten herein.

13. Plaintiff, Casey D. Stengel, alleges that all of the named defendants participated in a conspiracy in connection with the incident heretofore described which was intended to deny this Plaintiff equal protection of the laws and due process of law and that this Plaintiff was injured and deprived of rights which are his under the Constitution of the United States, said conspiracy being an attempt by all the defendants to whitewash the incident by covering up the true story of what had occurred and as a protection and defense for the unlawful act of defendant, Raymond L. Belcher, filing unfounded charges against this Plaintiff of assault with intent to kill when in fact no such assault occurred and when in fact this Plaintiff was not armed with any weapon and when in fact this Plaintiff was shot in the back in connection with this incident. Additional and specific overt acts in furtherance of this conspiracy are as follows: (1) failure by Columbus Police to have a determination to the extent of alcohol in Officer Belcher's body at the time of the incident at a time when such determination would have been meaningful; (2) intimidation of witnesses by holding occupants of the Cafe at the time of the incident at the Columbus Police Station for four to six hours after the shooting during which time Officer Belcher's girlfriend who was not immediately taken to Police Headquarters as were the other occupants in the Cafe at the incident, was permitted to return to her apartment where she was met by an Officer Hawk with whom she

discussed the incident and then was taken to Police Headquarters for a formal statement; (3) intimidation of witnesses who were with the Plaintiff and Plaintiffs decedents prior to their visit to Jimmie's Cafe at the time of the incident in question; (4) preparing a tentative report that determined the cause of death of the two plaintiffs after less than 24 hours and announcing it to the news media which in effect usurped the function of the County Coroner of Franklin County; (5) giving a long series of incomplete and inaccurate reports of this incident to news media which tended to deprive Plaintiff, Casey D. Stengel, of his right to a fair trial on the false charges filed against him as a result of the attempt to whitewash the incident and protect Officer Raymond L. Belcher from responsibility for his unlawful acts; (6) announcing publicly for the first time after this incident a prior commendation allegedly given Officer Raymond L. Belcher for restraint in the use of force in another unrelated incident; and (7) giving conflicting reports to news media all of which were designed to justify the actions of defendant, Raymond L. Belcher.

14. Plaintiff, Casey D. Stengel, alleges that the conspiracy heretofore described was to obstruct justice by giving special protection to a fellow police officer, to-wit: Raymond L. Belcher, and was entered into and continued with intent to deny Plaintiff, Casey D. Stengel, and both of the plaintiffs' decedents equal protection of the laws and deprive Plaintiff, Casey D. Stengel, and the other plaintiffs of their rights to due process of law and further, Plaintiff, Casey D. Stengel, alleges that as part of the conspiracy heretofore described, Det. Sgt. P. Hopkins filed a false charge of assault with intent to kill which said Raymond L. Belcher knew was false as Plaintiff, Casey D. Stengel, was unarmed and was shot in the

back. Plaintiff, Casey D. Stengel, further alleges that he has suffered humiliation and deprivation of his liberty for brief periods during procedures in connection with the charge about many of which no fair attempt was made to notify him and has suffered humiliation and embarrassment by actions of the police in arresting him as a fugitive from the foregoing charge after prior notice to the news media when the police department knew or should have known with the exercise of any reasonable diligence that a paralyzed man was not a fugitive and when in fact Plaintiff, Casey D. Stengel, had been in Franklin County at all times since the incident, received regular treatment and care at Riverside Hospital, Columbus, Ohio, and at Dodd Hall, Ohio State University, both as a patient and an out-patient, that Casey D. Stengel's whereabouts was easily ascertained from the Franklin County Welfare Department from which he was receiving assistance for medical expenses and other expenses. Plaintiff, Casey D. Stengel, further alleges that he has suffered damages by reason of incurring expenses for counsel to defend the false charge which has been filed in bad faith and as part of an attempt to bargain with him for a release of any claims against defendant, Raymond L. Belcher, and defendant, The City of Columbus, which is all part of the pattern of conspiracy to protect a fellow police officer in trouble and deny an ordinary citizen due process of law and equal protection of the laws by obstructing justice and intimidating witnesses.

15. WHEREFORE, Plaintiff, Casey D. Stengel, prays for damages in the Second Claim therein against all the defendants in the amount of ONE HUNDRED THOUSAND DOLLARS as compensatory damages and for FIVE HUNDRED THOUSAND DOLLARS as punitive damages and that on final hearing all of the defendants

be permanently enjoined from harassing and interfering with the civil liberties of this Plaintiff.

THIRD CLAIM

16. Plaintiff, Charles Ruff, Administrator of the Estate of Robert D. Ruff, deceased, incorporates and realleges paragraphs numbered one through nine of this Complaint and further alleges that this plaintiff's decedent like plaintiff, Casey D. Stengel, for all the reasons given in paragraphs one through nine of the Complaint was deprived of rights, privileges and immunities secured to him by the Constitution and laws of the United States and particularly the right to equal protection of the laws and to due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

17. Plaintiff, Charles Ruff, Administrator, alleges that Robert D. Ruff was unarmed and not guilty of any conduct or attack on any person during the incident heretofore described in the Complaint and his killing occurred because of drinking by Raymond L. Belcher and his intervention in a minor argument as heretofore described in the Complaint and Raymond L. Belcher's sudden panic when Casey D. Stengel intervened after the sudden attack by Raymond L. Belcher as heretofore described in this Complaint.

18. Plaintiff, Charles Ruff, Administrator, alleges that Robert D. Ruff's wife and next of kin have suffered pecuniary damages in the amount of ONE HUNDRED THOUSAND DOLLARS by reason of his wrongful death of Robert D. Ruff.

19. WHEREFORE, Plaintiff, Charles Ruff, Administrator of the Estate of Robert D. Ruff, prays damages

against defendants, Raymond L. Belcher, Dwight Joseph, and The City of Columbus in the amount of ONE HUNDRED THOUSAND DOLLARS and costs.

FOURTH CLAIM

20. Plaintiff, Charles Ruff, Administrator of the Estate of Robert D. Ruff, incorporates and realleges paragraphs numbered twelve, thirteen and fourteen of the Complaint as if fully rewritten herein and further states that the conspiracy described by incorporating and realleging paragraphs twelve, thirteen, fourteen and fifteen of the Complaint was entered into and continued with intent to deny the Estate of Robert D. Ruff equal protection of the laws and due process of law and to obstruct justice and thus defeat the wrongful death claim of the Estate of Robert D. Ruff.

21. WHEREFORE, Plaintiff, Charles Ruff, Administrator of the Estate of Robert D. Ruff, prays damages against all the defendants named in this Complaint in the amount of TWENTY THOUSAND DOLLARS in this Fourth Claim.

FIFTH CLAIM

22. Plaintiff, Timothy Noe, Administrator of the Estate of Michael J. D. Noe, deceased, incorporates and realleges paragraphs numbered one through nine of this Complaint and further alleges that this Plaintiff's decedent like Plaintiff, Casey D. Stengel, for all the reasons given in Paragraphs one through nine of the Complaint was deprived of rights, privileges and immunities secured to him by the Constitution and laws of the United States and particularly the right to equal protection of the laws and to due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

23. Plaintiff, Timothy Noe, Administrator, alleges that Michael J. D. Noe was unarmed and not guilty of any conduct or attack on any person during the incident heretofore described in this Complaint and that the killing of Michael J. D. Noe occurred because of drinking by Raymond L. Belcher and his intervention in a minor argument as heretofore described in the Complaint and Raymond L. Belcher's total panic when Plaintiff, Casey D. Stengel, intervened as heretofore described after the attack by Raymond L. Belcher as heretofore described in this Complaint.

24. Plaintiff, Timothy Noe, Administrator of the Estate of Michael J. D. Noe, alleges that the next of kin of Michael J. D. Noe have suffered pecuniary damages in the amount of THIRTY THOUSAND DOLLARS by reason of the wrongful death of Michael J. D. Noe as heretofore described.

25. WHEREFORE, Timothy Noe, Administrator of the Estate of Michael J. D. Noe, prays damages against defendants, Raymond L. Belcher, Dwight Joseph and The City of Columbus in the amount of THIRTY THOUSAND DOLLARS and his costs in this Fifth Claim.

SIXTH CLAIM

26. Plaintiff, Timothy Noe, Administrator of the Estate of Michael J. D. Noe, incorporates and realleges paragraphs twelve, thirteen and fourteen of the Complaint as if fully rewritten herein and further states that conspiracy described by such incorporated and realleged paragraphs was entered into and continued with intent to deny the Estate of Michael J. D. Noe equal protection of the laws and due process of law and with intent to obstruct justice and thus defeat the wrongful

death claim of the Estate of Michael J. D. Noe heretofore described.

27. WHEREFORE, Plaintiff, Timothy Noe, Administrator of the Estate of Michael J. D. Noe, prays damages against all the defendants named in this Complaint in the amount of TWENTY THOUSAND DOLLARS in this Sixth Claim and for his costs.

SEVENTH CLAIM

28. For a Seventh Claim the Plaintiff, Casey D. Stengel, incorporates and realleges paragraphs numbered one through twenty-seven of this Complaint as if fully rewritten herein.

29. Pursuant to the provisions of Rule 23 (c)(4), Federal Rules of Civil Procedure, Plaintiff, Casey D. Stengel, brings the Seventh Claim on behalf of himself and all the other citizens of the City of Columbus, Ohio, a class of approximately 539,700 persons. Joinder of all members of the class for this claim is impracticable. There are questions of law or fact common to the class.

30. Plaintiff alleges that the City of Columbus, Ohio, by police regulation, requires off-duty policemen to carry arms at all times based on the theory that police officers and the police chief are on duty 24 hours of each day.

31. As a result of said regulation, police officers of the City of Columbus carry concealed arms at all times even though said officers are not in uniform and are not identifiable to the public as police officers or as persons who are carrying lethal weapons.

32. During the regular eight hour tours of duty of Columbus police officers their conduct is governed by regulations about drinking, and many other regulations

about conduct and associations outside their official duties which do not apply during the sixteen hours of a day which are not within their regular tour of duty with the result that a large partially unregulated partially secret, but not an undercover or detective, police force is at large in the city with lethal weapons but without specific purpose of law enforcement at locations and at times and under conditions such as social drinking and rendezvous with members of the opposite sex which tend to impair the ability to exercise proper judgment and impair the ability to perform responsible and effective police work.

33. The aforesaid regulation requiring police officers to carry arms at all times seriously endangers the health, safety and welfare of the citizens of Columbus and endangers the constitutional rights of such citizens to due process of law and equal protection of the laws.

34. The aforesaid regulation exposes the citizens of Columbus to unnecessary danger by creating a situation whereby a citizen might incur serious bodily harm by refusing to obey the order of an off-duty policeman who is not known to such a citizen to be an officer of the law.

35. The aforesaid regulation instills or tends to instill in the police officers of the City of Columbus a mental attitude of secretiveness, intrigue and authority that is contrary to the health, safety and welfare of the citizens of Columbus and creates an imminent danger to the life and liberty of such citizens and to their rights guaranteed by the United States Constitution.

36. WHEREFORE, Plaintiff, Casey D. Stengel, on behalf of himself as a citizen of Columbus, Ohio, and all other members of such class prays in this Seventh Claim that the City of Columbus, Ohio, and all other defendants

herein be permanently enjoined from granting immunity to its police officers from the statutory law of Ohio which prohibits the carrying of concealed weapons when such officers are not in uniform or on a regular tour of duty in the nature of a plain clothes assignment or not performing ordinary and normal duties during the hours of full time, assigned and compensated duty and further prays that defendant, the City of Columbus, be permanently enjoined from enforcing the regulation authorizing its police officers to be armed at all times and authorizing said police officers to carry concealed weapons under color of law while engaged in personal activities.

DEMAND FOR JURY TRIAL

All Plaintiffs herein demand trial by jury of all claims in the Complaint to which they are entitled to a jury.

[Signatures omitted in printing]

JOINT EXHIBIT 44(b)

GENERAL ORDER

Columbus Police **Columbus, Ohio**

GENERAL ORDER NO. 70-9D	DATE OF ISSUE July 30, 1970
EFFECTIVE DATE July 30, 1970	RESCINDS General Order 70-1D
SUBJECT Weapons Regulations	REFERENCE Rule Book, Sections 480, 482

PURPOSE: The purpose of this general order is to clarify the weapons regulations of the Columbus Division of Police as they relate to types of authorized weapons and related equipment, the carrying of personal weapons and related equipment, the responsibility for their inspection, repair and maintenance, and the responsibility to report any discharge of a police weapon.

I GENERAL INFORMATION

A. **Carrying a Weapon on Duty**

Members of the Division of Police, while on duty, shall carry the weapon and ammunition issued to them.

1. Carrying a Personal Weapon on Duty
Members of the Division of Police desiring to carry a personal handgun **in addition to** their issue revolver shall request permission through the Police Range Officer. The Range Officer, after the weapon has been inspected and registered, shall forward the request to the Chief of Police for approval. Permission may be granted provided the following conditions are met:

a. The weapon shall be inspected, registered and approved by the Police Range Officer.

b. The weapon shall not exceed .38 caliber.
(1) The .357 Magnum is prohibited.

B. **Carrying a Weapon Off Duty**

Members of the Division of Police, while off duty, shall carry the weapon and ammunition issued to them.

1. Carrying a Personal Weapon Off Duty
Members of the Division of Police desiring to carry a personal handgun **instead of** their issue revolver shall request permission through the Police Range Officer. The Range Officer, after the weapon has been inspected and registered, shall forward the request to the Chief of Police for approval. Permission may be granted provided the following conditions are met:

a. The weapon shall be inspected, registered and approved by the Police Range Officer.

b. The weapon shall not exceed a .38 caliber.

(1) The .357 Magnum is prohibited.

It is recognized that there may be certain occasions when carrying a weapon while off duty would be impractical. An example is when a member is engaged in some sport or activity and the accepted style of clothing would restrict or preclude the carrying of a weapon.

Therefore, it is up to the good judgment of each member as to when it would be impractical to carry a weapon while off duty. If the member feels that the circumstances so warrant, he need not carry the weapon while off duty; however, justification for failing to do so may be required.

C. **Type of Handgun Ammunition Specified**

1. Regulation Super Vel 110 grain, .38 special, semi-ball, solid nose, factory load cartridges shall be carried and used at all times.
   a. In those cases where carrying a personal handgun has been authorized, appropriate ammunition may be carried and used.
2. No military or other jacketed bullet ammunition shall be carried. Dum-dum, hollow-point, wad-cutter, tracers or hand-loads shall not be carried or used at any time.

II INSPECTION, REPAIR AND MAINTENANCE OF WEAPONS

A. **Periodic Inspection Required**

Supervisory officers are responsible for the periodic inspection of all issued or authorized weapons and related equipment carried by their subordinates, in order to insure that they are in proper working order and fully comply with the provisions of this order.

B. **Repair and Maintenance of Issued Weapons and Related Equipment**

All issued weapons and related equipment in need of repair, adjustment or refinishing shall be submitted to the Police Range Officer.

1. Members of the Division of Police shall not permit any person, except those authorized by the Police Range Officer to perform repair work of any kind on any issued weapon or related equipment.
2. Members of the Division of Police shall be held strictly accountable for any damage to issued weapons or related equipment, which is caused by roughness, carelessness, or by permitting any unauthorized person to use, tamper with or repair his weapon or related equipment.

III CERTAIN WEAPONS PROHIBITED

A. **General**

No member or employee of the Division of Police shall carry, have in his possession or use, at any time, any weapon of the type commonly referred to as "brass knuckles" or other similar weapons.

1. Any weapon, worn on the hand or concealed in gloves, made of a hard material (metal, wood, plastic, etc.) shall be prohibited by this order.
2. This order does not prohibit the carrying or use of the night stick, riot baton or blackjack.

B. **Rifles and Shotguns**

Members and employees of the Division of Police are prohibited from carrying, having in their possession or using any personal weapons such as rifles, carbines or shotguns, of any description, while on duty.

C. **Other Weapons**

Members and employees of the Division of Police are prohibited from carrying, having in their possession or using any personal weapons such as automatic or semi-automatic rifles, carbines or shotguns, of any description, while on duty.

IV REPORTING REQUIREMENTS

A. **Procedure to be Followed When Firearm is Discharged**

1. An officer shall be subject to discipline if the of a firearm involves:
   a. A violation of law by him.
   b. A violation of department regulations.
   c. Poor judgment involving wanton disregard of public safety.
   d. Accidental discharge of gun through carelessness or horseplay.
2. In order to enforce the guidelines for use of weapons, the Police Division shall require a detailed written report on all discharges of firearms except at an approved range.
   a. Whenever a police officer discharges his firearm, either accidentally or in the performance of police duty, he shall verbally notify his immediate on-duty supervisor as soon as time and circumstances permit. Further, a police officer who discharges his firearm shall forward a written report of the incident through established channels to the police chief and a carbon copy to his superior officer within his tour of duty of the incident.

3. Each discharge of a firearm, except at an approved range, shall be investigated by an on-duty commanding officer. After conducting a thorough investigation of the circumstances surrounding the discharge of firearms, the commanding officer shall submit a detailed written report of the results of the investigation to the police chief through channels.

BY ORDER OF:
DWIGHT W. JOSEPH
Chief of Police

APPROVED BY:
JAMES J. HUGHES, JR.
Director of Public Safety

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action 72-67

(Title Omitted in Printing)

PROCEEDING

Before the Honorable Joseph P. Kinneary, Chief Judge, and jury duly empaneled and sworn, sitting at Columbus, Ohio.

FRIDAY MORNING SESSION
JUNE 14, 1974.

RAYMOND BELCHER

called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

DIRECT EXAMINATION

[pp. 650, 651, 652 and 661]

[650] I took my tear gas cannister from my pocket, put it in my hand, and in half-croached positions, slid out of the booth. My intention at that time was to walk directly to the front door of Jimmie's Cafe, go through the door, outside, go out onto the sidewalk and use the phone booth which is located just about 20 feet from the front door of that bar.

My intention was not to call the police from inside. I felt at that time that I would never be allowed to make that call. As I stood up from the booth, Mr. Stengel ran from the juke box, he jumped right on my back, locked his arms around my neck and I was nearly thrown to the floor.

I believe I had reached a standing position. I twisted my face around to Mr. Stengel and I said, Let go of me."

Mr. Stengel began throwing punches, attempting to strike me with his fist, and attempted to throw me to the floor. I grabbed ahold of the side of the booth and again told him to let go of me.

Mr. Ruff ran across the floor at that point and I was fighting both men. I was tripped or thrown on top of a small table there by the front of the bar itself, I think they are known as cabaret or cafe tables, they are very small tables, maybe two feet square.

My back went over this table. My head struck the juke box, and I recall being kicked for a moment after that. I was **[651]** kicked several times and then there was a moment of darkness where I could neither feel nor hear anything. I don't know whether I was unconscious or apparently I was, but how long I was unconscious I have no idea. It could have been ten seconds; it could have been ten minutes.

As I looked up from the floor with my legs up over a table, I could see nothing but feet and fists. I was being kicked in the face and the head by at least two men.

At that time I tried to get off the floor. I literally tried to pull myself up off the floor by using the men's clothing that were on top of me. I at one point had a man's belt in my hand and tried to drag myself up off the floor by his belt buckle, so I could get up off the floor and defend myself.

I was kicked first one direction, then the other direction. I continued to try to get up off the floor. I was getting tired. I was beginning to lose.

At that time somewhere in this struggle my tear gas was kicked out of my hand. I had been spraying it, trying to spray directly into these men's faces from the floor

but somewhere during the fight the tear gas was stomped from my hand.

As I began to realize that I wasn't gonna be able to get myself off the floor, I reached for the pistol that I carried in my waistband in my pants. At that time I was carrying a .32 Browning automatic, and the gun was not there. **[652]**

I was still being kicked and stomped. I put my arms, my left arm over my face to shield my face from these kicks, and looked across the shiny barroom floor to see if the pistol was lying there some place.

The gun was not there. The thought went through my mind, oh, God, if these men, whoever they are, find that gun on the floor, they will kill me with my own weapon.

I felt the pistol underneath my back, still being kicked and stomped. I brought the weapon around in my right hand and shoved backwards to get these men off of me and I fired three shots straight into the ceiling, or straight into the mass of bodies that were on top of me.

Two men fell to the floor, one man, the young man I know as Mike Noe, ran out the door. I got onto my feet and chased Mr. Noe outside. I did catch up with him. We struggled. Mr. Noe was struggling violently with me as if to escape. I struck Mr. Noe with the pistol across the face.

This struggle took place on the sidewalk in front of the bar directly in front of the large front window of Jimmie's Cafe. As I struck Mr. Noe, I was facing the front of the bar and the gun went off I believe as it struck his forehead or as my arm came forward. I still couldn't say when it happened.

* * *

[661] MR. HUGHES: Officer Belcher, as you were laying on the floor after you had come to after you had recovered your weapon, as you removed the weapon from behind your back and pointed it upward —

MR. TAYLOR: I object to the form even at this stage.

THE COURT: Your objection is premature. Q. — what thought was in your mind?

THE COURT: Just a minute. Do you object to this question?

MR. TAYLOR: Yes, sir.

THE COURT: Come up.

(Thereupon followed a discussion off the record.)

THE COURT: The objection is overruled. You may answer that question. A. I am sorry. Sir, would you repeat the question?

THE COURT: Have the reporter read it back.

(Thereupon said question was read back.) A. The thought in my mind at that point was that I was going to be killed on that barroom floor if I did not use the weapon I had, I would be killed.